SUPREME COURT, U.S.
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No. 01-519

IN THE

Supreme Court of the United States

GABRIELE OMLIN,

Petitioner,

v.

KAUFMAN & CUMBERLAND COMPANY, L.P.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should the Supreme Court accept for review the decisions of federal courts in Ohio which correctly applied the Ohio statute of limitations for lawyer malpractice in an action venued in Ohio against Ohio lawyers alleging malpractice in their conduct of litigation for the client in Ohio state courts, where no federal question or constitutional issue was involved?

STATEMENT PURSUANT TO RULE 29.6

Respondent, Kaufman & Cumberland Company, L.P.A., has no parent corporation and no publicly held company owns 10% or more of its stock.

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Respondent respectfully prays that the petition for a writ of certiorari be denied.

OPINIONS BELOW

The order of the Court of Appeals for the Sixth Circuit is satisfactorily reprinted as Appendix A to the petition, as is the order of the Court of Appeals denying petitioner's motion for rehearing and rehearing en banc, which is Appendix C to the petition.

Petitioner's Appendix B — the opinion and order of the district court — is not printed verbatim and is marred by many typographical and editorial mistakes. The district court's order as correctly reprinted appears as Appendix A to this brief.

STATEMENT OF THE CASE

Petitioner, a citizen of Switzerland, visited northern Ohio for business reasons in October, 1994 and rented a house in Willoughby Hills, Lake County, Ohio for a term expiring on March 31, 1996. She and her landlord developed a hostile relationship because of his intrusive visits to the site, ostensibly to inspect the property. When she attempted to curtail his inspections to only once a month, he filed suit in the Lake County Municipal Court to enforce his right to inspection under the Ohio Landlord-Tenant Act. He also sought attorneys' fees, as permitted by that act. Ms. Omlin engaged counsel who filed an answer and counterclaim on February 29, 1996. On March 5, 1996 a hearing was held before a magistrate at which both parties were present and were represented by legal counsel. *See Ursetti v. Omlin*, unreported, 1998 Ohio App. LEXIS 5989 (December 11,

1998) *4. The parties then agreed on a date and time for the landlord to inspect the property. The magistrate ordered the inspection to go forward as agreed. On March 19, 1996 the trial court adopted the magistrate's order as its own and scheduled a pretrial conference for April 2, 1996. On March 25, 1996 Ms. Omlin's counsel filed a motion to withdraw the counterclaim against the landlord and a motion to withdraw as her counsel, pursuant to her request. *Ibid.* The trial court granted both motions the following day. As of March 26, 1996, Ms. Omlin was proceeding *pro se*.[1]

Her visa to the United States was to expire in four days, on March 30, 1996. On March 30, 1996, she filed a letter with the court stating that she was not available for a pretrial conference on April 2 "or any further trial" because her visa had expired. *Id.**5. The magistrate conducted the pretrial conference on April 2, 1996. Ms. Omlin was not present. He recommended that the court hold a trial on the question of whether the landlord was entitled to any damages or attorneys' fees. The court issued an order on April 3, 1996 ordering trial on May 15, 1996. *Id.**6. The landlord's counsel moved for a continuance. On April 16, 1996 the court granted the continuance and rescheduled the trial for May 24, 1996. On May 23, 1996 Ms. Omlin sent the court a facsimile transmission from Switzerland containing an affidavit in which she acknowledged receipt of the trial court's orders of April 3 and April 16, 1996. *Ibid.* She stated that she would be unable to appear for trial on May 24. She did not request a continuance. Her affidavit contained averments denying the landlord's allegations, implying that she wished the court to consider those averments in place of her live testimony. *Id.**6-7.

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1. The statement in petitioner's brief on p. 3 that before she went home "the matter was settled by agreement" is not factual. The litigation continued.

The case proceeded to trial before a magistrate on May 24, 1996. *Id.**7. Ms. Omlin did not appear and there was no counsel to represent her. Only the landlord testified. *Ibid.* On May 31, 1996 the magistrate filed a written decision finding that Ms. Omlin failed to allow her landlord to inspect the premises after reasonable notice, that she damaged the garage door opener in the amount of $320, and that the landlord was entitled attorneys' fees of $680. *Id.**7-8. The magistrate recommended that judgment be rendered for the landlord for $1,000 and that he should keep her $1,000 security deposit to satisfy the judgment. *Id.* *8. On June 27, 1996 the court adopted the magistrate's decision and entered judgment against Ms. Omlin in the amount of $1,000 plus 10% interest. *Ibid.* A copy of the judgment entry was mailed to her address in Switzerland. *Ibid.* She allegedly did not receive it until July 26, 1996. *Ibid.* Under Ohio law the last day for filing a notice of appeal was July 27, 1996.[2]

On or about Friday, August 2, 1996 Ms. Omlin spoke by telephone to Frank Cumberland, a principal in the Cleveland firm Kaufman & Cumberland. The time for filing a notice of appeal had expired. Mr. Cumberland agreed to represent her after explaining the risks of nonsuccess and the potential for more expense than the judgment warranted. He filed a notice of appeal to the Lake County Court of Appeals on August 23, 1996, and in subsequent briefs he argued that the Hague Convention gave Ms. Omlin more time to appeal than was afforded by the Ohio Rules of Appellate Procedure.

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2. Petitioner's statement on page 4 of her brief that "on July 27, 1996 petitioner sent by fax a notice of appeal" seems to be unfactual. There is no record of any timely notice of appeal sent by her — by fax or otherwise.

In an opinion rendered on December 2, 1996 the Court of Appeals for Lake County held that she failed to qualify for the relief provided by Article 16 of the Hague Convention because she had appeared in the action prior to the judgment against her. The extension of time available under the Hague Convention could only be obtained by those who had suffered default judgments in cases in which they had not appeared at all. Ms. Omlin had appeared on February 29, 1996 by filing her answer and counterclaim. Because she had received notice of the suit and had entered an appearance, and was aware of the trial date, and did not arrange for a continuance or for coverage by counsel, and had provided evidence to the trial court by affidavit *in absentia*, the Court of Appeals concluded that relief was not available under the Hague Treaty. *Ursetti v. Omlin*, unreported, Case No. 96-L-147, Court of Appeals of Ohio, 11th Dist., December 2, 1996.

After the Court of Appeals dismissed her appeal, Ms. Omlin instructed her lawyers not to appeal to the Ohio Supreme Court. Kaufman & Cumberland then filed a separate action for her against her ex-landlord in the Common Pleas Court of Cuyahoga County, Ohio. They deposed the landlord and his wife. On the basis of that testimony she filed a motion for relief from the $1,000 judgment in the Willoughby Municipal Court, seeking vacation of that judgment because it was obtained by fraud of the prevailing party. On August 15, 1997 a hearing on that motion was held before a magistrate. Ms. Omlin returned from Switzerland for the hearing and both she and her ex-landlord testified. The magistrate issued a written opinion in which he recommended that her Rule 60(B) motion be denied. She filed objections. On October 10, 1997 the court overruled her objections and adopted the magistrate's recommendation. Kaufman & Cumberland filed a motion for reconsideration and a notice of appeal and began their brief to the Court of Appeals in November, 1997.

In December, 1997 Ms. Omlin informed Mr. Cumberland that she would withhold payment on outstanding invoices until he could show her a brief which she approved for filing in the Court of Appeals. Cumberland refused to agree to this. He told her by fax on December 4, 1997 that she could either pay her bills or find other counsel. On December 5, 1997 she promised to pay and asked Cumberland not to stop work. Kaufman & Cumberland completed their brief and filed it with the Court of Appeals on January 2, 1998.

On January 5, 1998 Ms. Omlin faxed Cumberland an ultimatum. She said she was "frustrated by the mistakes in your lawyering, your refusal to apply the Landlord-Tenant Law, and the unsuccessful results." She demanded:

> Either try to correct your mistakes by following up the appeal on your own costs or withdraw as counsel from the Willoughby case as well as the Cuyahoga case. Please let me have your decision on this by fax by tomorrow.

Cumberland replied by fax on January 6 that he would ask the courts for permission to withdraw. He asked her to provide concise instructions suitable for attachment to a motion to withdraw. She immediately responded with two faxes on January 6, 1998 instructing Cumberland and his associate to withdraw as her counsel from both cases "effective immediately." She promptly engaged other counsel to represent her.

On January 8, 1999, one year and two days after she terminated her attorney-client relationship with Kaufman & Cumberland, Ms. Omlin filed a malpractice complaint against them in the U.S. District Court for the Northern District of

Ohio. Her complaint was filed two days after the expiration of the Ohio statute of limitations for legal malpractice actions. The district court entered summary judgment for Kaufman & Cumberland on the ground that her action was untimely. The Sixth Circuit affirmed.

REASONS FOR DENYING THE WRIT

1. The judgment of the Sixth Circuit does not invoke any of the grounds for relief recognized by Rule 10 of the Supreme Court Rules.

Rule 10 provides that "A petition of a writ of certiorari will be granted only for compelling reasons." This case presents no compelling reason. The Sixth Circuit's judgment does not conflict with any decision of another circuit on the same question. The Sixth Circuit did not decide an important federal question in a way that conflicts with the decision by a state court of last resort. It did not decide an important federal question in a way that conflicts with relevant decisions of this Court. And its judgment has not so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power.

2. The courts below properly applied Ohio law concerning the period of limitations for actions against lawyers for malpractice.

In Ohio the statute of limitations for lawyer malpractice is one year. Ohio Revised Code Section 2305.11(A)(1) provides:

> [A]n action for . . . malpractice other than an action upon a medical, dental, optometric or

> chiropractic claim . . . shall be commenced within one year after the cause of action accrues.

An action for lawyer malpractice accrues and the statute of limitations begins to run

> when there is a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney, or when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

Zimmie v. Calfee Halter & Griswold, 43 Ohio St. 3d 54 (1989), syllabus.

Ms. Omlin's cause of action against Kaufman & Cumberland accrued on January 6, 1998 because that was the date on which she terminated the attorney-client relationship with prior knowledge of their "mistakes in lawyering." Her fax of the previous day, January 5, 1998, itemized the firm's alleged mistakes:

- Not basing the Rule 60(B) motion on the Landlord-Tenant Law.
- Not using the testimony of additional witnesses at the hearing on the 60(B) motion.
- Not making full use of the evidence in their files.
- Not doing adequate research.

- Failing to challenge the eviction summons on additional grounds.

- Not bringing to the municipal court's attention the three-day notice provision in the Landlord-Tenant Law.

Her knowledge of the firm's alleged malpractice thus occurred before she terminated the relationship.

Because the Ohio statute of limitations accrues upon the later of two events — discovery of attorney errors or termination of the relationship — Ms. Omlin's fax of January 6, 1998 marked the accrual date for the statute of limitations. The Ohio cases recognize that an attorney-client relationship may be dissolved by either party upon clear and unambiguous notice to the other. *Flynt v. Brownfield Bowen & Bally*, 882 F.2d 1048, 1050-52 (6th Cir. 1989) (letter from attorney); *Hickle v. Malone*, 110 Ohio App. 3d 703, 706-07 (1996) (letter); *Wozniak v. Tonidandel*, 121 Ohio App. 3d 221, 226 (1997) (oral notice and letter); *Brown v. Johnstone*, 5 Ohio App. 3d 165 (1982) (letter of complaint to grievance committee).

When the termination of the attorney-client relationship has been signaled by unambiguous communication, the relationship is not extended for statute of limitations purposes by the time it takes the attorney to obtain court approval to withdraw. *Wozniak v. Tonidandel*, 121 Ohio App. 3d 221 (1997); *Flynt v. Brownfield Bowen & Bally*, 882 F.2d 1048, 1050-52 (6th Cir. 1989).

Both lower courts correctly applied Ohio law to the undisputed facts, and Ohio law controls. The cases cited by

petitioner at pages 13-21 draw upon decisions expressive of the laws of other states — Arkansas, Texas, Arizona, Florida, Illinois, Alaska and Tennessee. All of these are irrelevant. Ohio law is the governing law and must be applied by federal courts sitting in Ohio.[3]

The discussion of the Ohio cases cited in the petition at pages 18-21 is marred by confusion of dissenting opinions with majority opinions and blends dissenting language with majority holdings. It is unhelpful and misleading.

3. The Sixth Circuit's decision does not disallow breach of contract suits against attorneys.

Ohio attorneys are responsible for their contractual obligations, and breach of contract actions can be brought against them in appropriate cases. However, actions against Ohio attorneys for breach of their professional duties to clients — whether characterized in pleadings as an action for breach of contract, breach of fiduciary duty, fraud or negligence — are all deemed actions for professional malpractice governed by the one-year statute of limitations. *Hibbett v. Cincinnati*, 4 Ohio App. 3d 128, 131 (1982); *Muir v. Hadler Real Estate*

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3. 28 U.S.C.A. § 1652, the Rules of Decision Act, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as the rules of decision in civil actions in the courts of the United States, in cases where they apply.

Cases holding that state statutes of limitations must be applied by federal courts in malpractice cases include *Summers v. Wallace Hospital*, 270 F.2d 831, 833 (9th Cir. 1960) and *FDIC v. Alexander*, 78 F.3d 1103 (6th Cir. 1996).

Management Co., 4 Ohio App. 3d 89, 90 (1982); *Ward v. Lynch*, unreported, 1995 WL 723299 *3; *Erickson v. Misny*, unreported, 1996 WL 239883, pp. 5-6.

The *Muir* decision does not impair the obligations of contracts. *Muir* does not create "two classes of people (the class of attorneys/law firms who cannot be sued for breach of contract . . . and the class of clients who can be sued for breach of contract, but cannot sue their attorneys/law firms for breach of contract)" as petitioner argues at page 23. Neither *Muir* nor any other Ohio case on the statute of limitations for lawyer malpractice presents a due process issue, as petitioner claims. The decisions of the courts below do not grant immunities to lawyers which do not attach to any other class of citizens. No equal protection or due process issue is presented by this case.

4. The courts below did not fail to consider Petitioner's amended complaint or her opposing affidavits.

The district court granted summary judgment because the action was not commenced within the time limited by the Ohio statute of limitations. Petitioner failed to offer *evidence* creating a jury issue on that defense. Her two-page affidavit and her five-page affidavit, both executed in Basel, Switzerland on February 11, 2000, are devoid of facts creating a jury issue on the statute of limitations defense. Petitioner's amended complaint was insufficient by itself to raise a jury issue. In resisting a motion for summary judgment a party may not rely upon mere pleadings. The party's burden is to offer evidence which opposes the adversary's evidence and demonstrates the existence of an issue for the trier of fact. Ms. Omlin could not do that because the uncontradicted documented evidence established that her complaint was filed two days late.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION DATED AND FILED JULY 6, 1998

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:99CV00047
JUDGE O'MALLEY

GABRIELE OMLIN,

Plaintiff,

v.

KAUFMAN & CUMBERLAND CO.,

Defendant.

MEMORANDUM & ORDER

Plaintiff Gabriele Omlin, a citizen of Switzerland, brings this action pro se against her former Cleveland, Ohio law firm, Kaufman & Cumberland Co., L.P.A. ("K&C"). In her complaint, Omlin alleges that: (1) the work performed by K&C "was below the minimum standard of care," complaint at ¶4; (2) K&C "failed to comply with [its] fiduciary duty to do the proper discovery work," *id.* at ¶5; and (3) K&C made "false and fraudulent" misrepresentations to her, "for the purpose of inducing [her] to enter into a representation agreement," *id.* at ¶8. In her complaint, Omlin does not

separately set out her claims; a fair reading of the complaint, however, suggests she seeks to assert claims for breach of contract, breach of fiduciary duty, and fraud.[1] The Court has diversity jurisdiction over this action, pursuant to 28 U.S.C. §1332(a)(2).

K&C has filed a motion for summary judgment (docket no. 37), and Omlin has filed a cross-motion for summary judgment (docket no. 42). For the reasons stated below, K&C's motion is **GRANTED**, Omlin's motion is **DENIED**, and this case is **DISMISSED**.

I.

The following material facts are not in dispute. Omlin's initial contact with K&C occurred on August 2, 1996, when she met with attorney Frank Cumberland. Omlin asked Cumberland to represent her in connection with a legal dispute she had with her landlord.[2] The landlord had already obtained a $1,000.00 judgment against her in Willoughby, Ohio Municipal Court, and she wanted the judgment vacated or reversed (the "Willoughby Case"). Unfortunately for

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1. Reading the complaint charitably, Omlin also seeks to assert a claim for negligent or intentional infliction of emotional distress. *See* complaint at ¶10 ("[a]s a direct and proximate result of [K&C's] misrepresented competence, their breach of contract, their breach of fiduciary duty, their negligence, their misleading legal advice and misleading status reports, plaintiff . . . incurred not only monetary loss, but also mental anguish, pain and suffering").

2. Omlin lived in Willoughby, Ohio for about a year, but has since returned to her home country.

Omlin, when she first met with Cumberland, the time within which to file a timely appeal of the Willoughby Case trial court judgment had already expired. K&C explained this to Omlin, but she was insistent on pursuing an appeal anyway; she urged K&C to argue on appeal that the Hague Convention allowed her additional time. K&C decided it could represent Omlin, so, on September 5, 1996, Cumberland sent Omlin a "letter of engagement," setting out the terms of their agreement. On September 12, 1996, Omlin signed the letter, agreeing to its terms.

K&C proceeded to pursue Omlin's interests on two different fronts. First, with regard to the $1,000.00 judgment, K&C filed a direct appeal of the Willoughby Case, as Omlin had requested. Second, K&C filed a complaint, on Omlin's behalf, against her ex-landlord, asserting claims for breach of contract, invasion of privacy, fraud/misrepresentation, negligence, and breach of the Ohio Landlord-Tenant Act (the "Cuyahoga Case"). Later, K&C also filed a motion for relief from judgment with the trial court in the Willoughby Case.[3] On December 10, 1996, the state appellate court in the Willoughby Case rejected Omlin's resort to the Hague Convention and dismissed the appeal as untimely. On October 10, 1997, the trial court denied the motion for relief from judgment. Pursuant to Omlin's direction, on November 7, 1997, K&C filed an appeal of the trial court's denial of the motion for relief from judgment in the Willoughby Case.

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3. The motion for relief from judgment in the Willoughby Case was premised on evidence obtained during discovery in the Cuyahoga Case, which seemed to contradict evidence the landlord had submitted at trial in the Willoughby Case.

Appendix

K&C began work on the Willoughby Case appellate brief. While doing so, Omlin gave K&C a lot of direction regarding the content she wanted in the brief. Early in December of 1997, Omlin suggested she wanted to withhold payment for legal fees until she could read and approve the contents of the appellate brief. K&C refused this arrangement because of the difficulty in coordinating with Omlin who was in another country, and Omlin relented. On January 2, 1998, K&C filed Omlin's brief with the state court of appeals. Three days later, on January 5, 1998, Omlin sent a fax to K&C, which stated:

> I am frustrated by the mistakes in your lawyering, your refusal to apply the Landlord-Tenant Law, and the unsuccessful results. I, therefore, herewith request you:
>
> > (a) either try to correct your mistakes by following up the appeal on your own costs or
> >
> > (b) to withdraw as counsel from the Willoughby case as well as the Cuyahoga case.
> >
> > Please let me have your decision on this by fax tomorrow.

K&C replied the following day, January 6, 1998, stating that it would withdraw as counsel from both cases. K&C also suggested options Omlin could pursue to protect her interests in the two pending cases, adding the statement that, "[y]ou

must give us specific written instructions of how you wish to have us proceed." Omlin responded the same day, asking K&C to advise the courts in both cases "that at my request you are withdrawing as counsel effective immediately." Omlin added that she would "obtain replacement counsel who will appear on my behalf."

On January 9, 1998, Omlin related to K&C that she had obtained Mr. Rossi as replacement counsel. K&C filed a motion to withdraw in the Cuyahoga Case on January 12, 1998; Mr. Rossi appeared at a case management conference in the Cuyahoga Case on January 14, 1998; and the court granted K&C's motion to withdraw on February 2, 1998. K&C also filed a motion to withdraw in the Willoughby Case; the state appellate court granted this motion on February 19, 1998.

II.

Federal Rule of Civil Procedure 56(c) governs summary judgment motions and provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law . . . .

Rule 56(e) specifies the materials properly submitted in connection with a motion for summary judgment:

> Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts

> as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein .... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denial of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

However, the movant is not required to file affidavits or other similar materials negating a claim on which its opponent bears the burden of proof, so long as the movant relies upon the absence of the essential element in the pleadings, depositions, answers to interrogatories, and admissions on file. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

In reviewing summary judgment motions, this Court must view the evidence in a light most favorable to the non-moving party to determine whether a genuine issue of material fact exists. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); *White v. Turfway Park Racing Ass'n, Inc.*, 909 F.2d 941, 943-44 (6th Cir. 1990). A fact is "material" only if its resolution will affect the outcome of the lawsuit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Determination of whether a factual issue is "genuine" requires consideration

of the applicable evidentiary standards. Thus, in most civil cases the Court must decide "whether reasonable jurors could find by a preponderance of the evidence that the [non-moving party] is entitled to a verdict." *Id.* at 252.

Summary judgment is appropriate whenever the non-moving party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322. Moreover, "the trial court no longer has a duty to search the entire record to establish that it is bereft of a genuine issue of material fact." *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989) (citing *Frito-Lay, Inc. v. Willoughby*, 863 F.2d 1029, 1034 (D.C. Cir. 1988)). The non-moving party is under an affirmative duty to point out specific facts in the record as it has been established which create a genuine issue of material fact. *Fulson v. City of Columbus*, 801 F. Supp. 1, 4 (S.D. Ohio 1992). The non-movant must show more than a scintilla of evidence to overcome summary judgment; it is not enough for the non-moving party to show that there is some metaphysical doubt as to material facts. *Id.*

III.

In its motion for summary judgment, K&C presents two arguments: (1) Omlin's action is barred by the statute of limitations; and (2) Omlin presented no issue of material fact regarding whether K&C breached any duty it owed to her.[4]

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4. The latter argument is premised, in part, on the fact that Omlin's own expert failed to find K&C breached any duty it owed her as counsel.

Because the Court finds the first of these arguments both persuasive and sufficient, it does not reach the second argument.[5]

In Ohio, the statute of limitations for an action for legal malpractice is one year. Ohio Rev. Code §2305.11(A)(1); *Zimmie v. Calfee, Halter & Griswold*, 538 N.E.2d 398, 400 (Ohio 1989). The limitations period

> begins to run when there is [1] a cognizable event whereby the client discovers or should have discovered that his injury was related to his attorney's act or non-act and the client is put on notice of a need to pursue his possible remedies against the attorney or [2] when the attorney-client relationship for that particular transaction or undertaking terminates, whichever occurs later.

Zimmie, 538 N.E.2d at 401. In this case, the second event is the later one. Omlin's alleged injuries, which put her on notice of a possible need to pursue remedies against K&C, were K&C's perceived "mistakes in lawyering." Omlin learned of

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5. The Court has some sympathy for Omlin, but only to the extent that there is evidence that she was treated badly by her landlord, who — despite treating her badly — succeeded in obtaining a $1,000.00 judgment against her. Nonetheless, the Court also notes that Omlin received fair warning from K&C that her chances of success were slim, and that the cost of representation was sure to exceed any monetary benefit. The problems that flow from Omlin's insistence that she wanted to pursue the Willoughby Case and the Cuyahoga Case despite the substantial cost, in order to vindicate herself "on principle," are of her own making.

these mistakes, at the latest, on January 5, 1998, when she sent K&C her ultimatum, demanding that K&C "correct its mistakes" or withdraw as counsel. Thus, the termination of the attorney-client relationship, itself, was the event triggering the running of the limitations period.

The termination of the Omlin's attorney-client relationship occurred on January 6, 1998, when Omlin directed K&C to advise the courts, in both the Cuyahoga Case and the Willoughby Case, "that at my request you are withdrawing as counsel effective immediately." An attorney-client relationship is not continued or extended, for limitations purposes, by the amount of time it takes the attorney to withdraw as counsel. *See Erickson v. Misny*, 1996 WL 239883 at *5 (Ohio Ct. App. May 9, 1996), *appeal disallowed*, 673 N.E.2d 142 (Ohio 1996) (rejecting arguments that, after the client obtained new counsel, the prior attorney-client relationship nonetheless continued until the prior attorney filed his notice of withdrawal or until the prior attorney returned the client's files); *Wozniak v. Tonidandel*, 699 N.E.2d 555, 559 (Ohio Ct. App. 1997), *appeal disallowed*, 685 N.E.2d 237 (Ohio 1997) ("Plaintiff's argument that [his attorney's] representation lasted until the court granted his motion to withdraw is meritless. This court recently rejected this very argument and held that in a statute of limitations context the conduct of an attorney can terminate an attorney-client relationship prior to the filing of the notice of withdrawal.") (citing *Misny*).

Omlin's unequivocal termination of her relationship with K&C on January 6, 1998, triggered the start of her one-year limitations period. Thus, Omlin was required to bring any

malpractice claim against K&C on or before January 6, 1999. She filed this action on January 8, 1999. Accordingly, her action is time-barred.

In her opposition to K&C's motion for summary judgment, Omlin argues that this action is "not a malpractice action, but a breach of contract claim." Opposition brief at 4. Omlin asserts, accordingly, that the applicable limitations period is 15 years, not one year. *See* Ohio Rev. Code §2305.06 (providing that the applicable limitations period for bringing an action on a written contract is 15 years). Case law makes it clear, however, that "[i]n Ohio the applicable statute of limitations is determined not from the form of pleading or procedure, but from the gist of the complaint." *Ward v. Lynch*, 1995 WL 723299 at *3 (Ohio Ct. App. Dec. 7, 1995). An "action against one's attorney for damages resulting from the manner in which the attorney represented the client constitutes an action for malpractice within the meaning of R.C. §2305.11, regardless of whether predicated upon contract or tort or whether for indemnification or for direct damages." *Muir v. Hadler Real Estate Management Co.*, 446 N.E.2d 820, 822 (Ohio Ct. App. 1982) (citations omitted). The *Muir* court continued: "[m]alpractice by any other name still constitutes malpractice. . . . [U]nprofessional misconduct may consist either of negligence or the breach of contract of employment. It makes no difference whether the professional misconduct is founded in tort or contract, it still constitutes malpractice. Accordingly, the one year malpractice statute of limitations set forth in R.C. 2305.11 is applicable." *Id.*

In this case, "[a]lthough [Omlin's] complaint alleges a breach of contract, there is no question that the gist of [her]

claim is for legal malpractice subject to the one year statute of limitations in R.C. §2305.11(A)." *Lynch*, 1995 WL 723299 at *3. Because she did not file her complaint in this case until after the limitations period had ended, K&C is entitled to summary judgment, as a matter of law.

IT IS SO ORDERED.

s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

Appendix

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 1:99CV00047
JUDGE O'MALLEY

GABRIELE OMLIN,

Plaintiff,

v.

KAUFMAN & CUMBERLAND CO.,

Defendant.

ORDER

For the reasons set forth in this Court's memorandum and order of this date, the defendant's motion is **GRANTED**, the plaintiff's motion is **DENIED**, and this case is **DISMISSED**.

IT IS SO ORDERED.

s/ Kathleen M. O'Malley
KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE